86-410

Supreme Court, U.S.
FILED
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CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a jury be expected to deliberate earnestly and impartially and return a fair verdict after it hears that a plaintiff will receive about a quarter million dollars ($250,000.00) in Social Security disability insurance benefits?

2. Can a plaintiff open the door to immaterial evidence of collateral benefits by proving up his damages?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RANDALL FRINT and YHONIS FRINT,

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-vs-

TEXACO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on May 1, 1986, and the denial of the Petition for Rehearing on June 6, 1986.

REFERENCE TO OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the United States District Court for the Southern District of Florida without opinion. Copies of the appellate Court's decision and its order denying petition for rehearing are attached hereto. The only opinion below pertinent to questions presented was rendered by the United States District Court for the Southern District of Florida granting Plaintiff's motion in limine and a copy thereof is attached hereto.

JURISDICTION

On May 1, 1986 the United States Court of Appeals for the Eleventh Circuit entered judgment. On June 6, 1986 it

denied Petitioners' petition for rehearing. This Honorable Court has jurisdiction over this cause pursuant to Title 28, United States Code, Section 1254 (1).

STATUTE AND RULE INVOLVED

28, U.S.C., SECTION 2111.

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61, Federal Rules of Civil Procedure.

> "No error either in the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding

which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioners filed this personal injury lawsuit in the Circuit Court in Palm Beach County, Florida. Respondent removed the action to the United States District Court for the Southern District of Florida based on diversity of citizenship and amount in controversy in excess of ten thousand dollars pursuant to 28 U.S.C. Section 1332 (1) and 28 U.S.C. Section 1441.

Petitioners alleged and presented evidence that RANDALL FRINT slipped on water issuing from a ruptured water line within Respondent's maintenance responsibility, fell and suffered severe and permanent bodily injuries.

Before trial Petitioners requested and were granted an order in limine

intended to keep immaterial and prejudicial evidence of collateral benefits from the jury.

Each and every issue of fact as to liability was strenuously contested at the trial. The testimony was in irreconcilable conflict.

During their case in chief, Petitioners presented the testimony of an economist relative to the present value of RANDALL FRINT'S loss of future earning capacity including loss of Social Security retirement benefits.

At the end of Respondent's presentation Respondent's vocational rehabilitation expert witness blurted into evidence unresponsive testimony to the effect that if RANDALL FRINT is totally disabled he will receive four hundred to five hundred dollars per month in Social Security disability insurance

benefits. Subsequently over Petitioners' objections Respondent elicited evidence relative to RANDALL FRINT'S eligibility for additional Medicare benefits. Defense counsel repeatedly stressed the collateral benefits in his summation. Respondent was granted a jury instruction to deduct collateral benefits from the verdict notwithstanding Petitioners' objection.

The jury returned a no-liability verdict. Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the decision and denied a petition for rehearing.

REASONS FOR GRANTING THE WRIT

The decision below appears to conflict with this Honorable Court's precedents. Tipton v. Socony Mobil Oil

Company, Inc., 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4, reh. den. 375 U.S. 936, 84 S.Ct. 328, 11 L.Ed.2d 268 (1963), Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), Eichel v. New York Central Railroad Co., 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). The appellate Court did not write an opinion. The conflict clearly appears when all potential alternative bases for decision are logically eliminated.

There is no doubt that the exclusionary corollary to Florida's applicable substantive common law collateral source rule prohibits mention of receipt by the plaintiff of Social Security disability insurance benefits. Winston Towers 100 Association v. DeCarlo, 481 So.2d 1261, (Fla. 3rd DCA 1986), Florida Physicians Insurance

Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1985), Stanley v. United States Fidelity & Guaranty Co., 425 So.2d 605 (Fla. 1st DCA 1982), Cook v. Eney, 277 So. 2d 848 (Fla. 3rd DCA 1973), cert. den. 285 So.2d 414 (Fla. 1973). Indeed, during oral argument before the Eleventh Circuit Court of Appeals, counsel for Respondent conceded that the Winston Towers case made this clear. Furthermore Florida courts have uniformly held that any suggestion that a plaintiff may receive significant collateral benefits constitutes harmful reversible error. Cook v. Eney, supra., Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975), Clark v. Tampa Electric Company, 416 So.2d 475 (Fla. 2nd DCA 1982), Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982), Stanley v. United States Fidelity and Guaranty Co., 425 So.2d 608 (Fla. 1st

DCA 1982), reversed on other grounds Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984).

Probably the appellate Court did not decide that Petitioners opened the door to the evidence for reasons set forth hereinafter. (If the Court did so decide, then the petition should be granted for the reasons set forth hereinafter).

State substantive common law collateral source rules could be significantly undermined if in diversity cases the harmless error rule was applied so as to override the exclusionary rule.

The error affected Petitioners' substantial rights. The natural effect of erroneous admission of evidence of significant collateral benefits is to endanger any possibility of fair deliberation and impartial verdict.

There can be no confidence that our jury was not swayed by the evidence.

> "...the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting....if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 66 S.Ct. at 1247-1248.

There was a lively dispute as to Respondent's liability for Petitioner's losses. Evidence presented by Petitioners and Respondent was in irreconcilable conflict on all critical

issues except damages. The parties heavily attacked the credibility of each others' liability witnesses. In these circumstances it was most critical to protect the jury from improper influence.

In these circumstances Respondent corrupted the trial with blurted immaterial, prejudicial testimony that RANDALL FRINT is eligible to receive Social Security disability insurance payments in the amount of four hundred to five hundred dollars per month for the rest of his life, thirty-five to forty years, about a quarter million dollars.

Defense counsel made the most of the collateral benefits in his summation. He told the jury that Petitioners would receive more from Social Security than RANDALL FRINT would have earned had he not been injured at all. He also decried "double payments."

It is very possible that our jury was motivated to find for Respondent as to liability by a belief that Social Security would meet Petitioners' needs or by a desire not to over compensate Petitioners at Respondent's expense. Tipton v. Mobil Socony Oil Company, supra., Eichel v. New York Central Railroad Co., supra, Savoie v. Otto Candies, Inc., 692 F.2d 363 (5th CCA 1982), Southern v. Plumb Tools, a Division of O'Ames Corporation, 696 F.2d 1321 (11th CCA 1983). It is impossible to place any confidence in such a difficult decision so corruptly influenced.

As stated previously, Petitioners presented the testimony of an economist relative to the present value of RANDALL FRINT'S loss of future earning capacity, including lost Social Security retirement

benefits. Respondent argued to the Circuit Court that in so doing Petitioners opened the door to testimony about RANDALL FRINT'S eligibility for collateral Social Security disability insurance benefits. This argument was wholly unmeritorious and probably the Circuit Court rejected it. However during the oral argument two Judges on the panel seemed to accept it. If this was the basis for the decision, the writ of certiorari should be granted.

The second question is of great importance. Indiscriminate application of the doctrine of curative admissibility could nullify the collateral source rule.

Petitioners properly used the economist's testimony to prove up their damages. The testimony was admissible. Raines v. New York Central Railroad Company, 51 Ill.2d 428, 238 N.E.2d 230

(1972), Krakar v. Don Swart Trucking, Inc., 323 F. Supp. 157 (W.D. Pa. 1971), Groat v. Walkup Drayage and Warehouse Co., 14 Cal.App.2d 350, 58 P.2d 200 (1936), Cunningham v. Rederiet Vindeggen A/S and M/S Trolleggen, 333 F.2d 308 (2nd CCA 1964), Boston and Maine Railroad v. Talbert, 360 F.2d 286 (1st CCA 1966), University of Delaware v. Munson, 316 A.2d 206 (Del. 1974), Annot., 81 ALR2d 949 (1962). The record will reflect that Respondent did not object to the testimony.

The doctrine of curative admissibility is properly invoked only to counteract the prejudicial effect of inadmissible evidence previously introduced. 1 Wigmore on Evidence, Section 15 (1983).

Furthermore, introduction of evidence quantifying plaintiff's losses

cannot logically justify admission of evidence as to his eligibility for collateral benefits. Evidence relative to collateral benefits is inadmissible not only because it is very prejudicial, but also because it is completely immaterial. Florida substantive common law permits a plaintiff to recover all his damages, including lost earning capacity, of which lost retirement benefits is a part, even if he is partially compensated by a collateral source. Evidence of collateral benefits simply is not pertinent regardless of a plaintiff's claims as to damages.

> "There is a general requirement that evidence submitted under the aegis of curative admissibility relate to the matter shown by the inadmissible evidence submitted by the other party. ...the aim of curative admissibility is to give the party harmed by the introduction of inadmissible evidence an opportunity to counter the inferences that may be drawn from that inadmissible evidence; he

should not be given a license to create prejudice of a different sort, unrelated to the prejudice caused him, merely so that he has a better chance of winning...

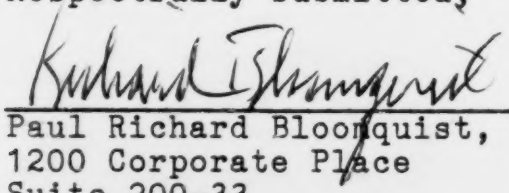
"The danger that the doctrine of curative admissibility is designed to meet is the danger that the jury will draw and use inferences with respect to immaterial matters, not that the jury will rely on unreliable evidence with respect to a material matter. If the latter concern were the true basis for the principle of curative admissibility, there would be no satisfactory reason to permit a counterattack with respect to that material matter by the use of normally inadmissible evidence since, by hypothesis, the rebutting evidence...also lacks significant probative value and thus cannot...be expected to diminish the prejudice inflicted by the other party's incompetent evidence..." 1 Wigmore on Evidence, Section 15 (1983).

If the Circuit Court decided Petitioners opened the door to the evidence it erroneously turned the doctrine of curative admissibility from a shield against prejudice against Respondent into a sword of prejudice against Petitioners.

It is hard to believe that the Eleventh Circuit Court of Appeals would make such a decision. Probably the Court decided that admission of the evidence, although erroneous, was harmless.

The decision below departed so far from the accepted and usual course of judicial procedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Honorable Court's power of supervision.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5398

RANDALL FRINT and
YHONIS FRINT,

Plaintiffs-Appellants,

versus

TEXACO, INC., a
foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(June 6, 1986)

BEFORE: FAY, Circuit Judge, HENDERSON* and NICHOLS**, Senior Circuit Judges.
PER CURIAM:

The petitions for rehearing filed by Randall Frint and Yhonis Frint is denied.

ENTERED FOR THE COURT:

PETER FAY
United States Circuit Judge

APPENDIX A

*See Rule 3(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable Philip Nichols, Jr., Senior U. S. Circuit Judge for the Federal Circuit, sitting by designation.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5398

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Plaintiffs-Appellants,

versus

TEXACO, INC., a
foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(May 1, 1986)

Before FAY, Circuit Judge, HENDERSON* and NICHOLS**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*See Rule 3(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable Philip Nichols, Jr., Senior U. S. Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-8282 Civ-GONZALEZ

RANDALL FRINT and
YHONIS FRINT,

Plaintiffs,

vs.

TEXACO, INC.,

Defendants

ORDER

THIS CAUSE has come before the Court upon the Motion in Limine filed on behalf of the plaintiffs.

The plaintiffs seek an order prohibiting the defendant from presenting evidence during trial regarding the receipt of compensation by the plaintiffs from collateral sources. Such collateral sources would include, but not be limited to workers' compensation, welfare and

APPENDIX C

insurance.

The defendant maintains that such an order would contravene recent Florida restrictions on the collateral-source rule. Specifically, the defendant asserts that the Florida legislature has eliminated the collateral-source rule in personal injury litigation arising from vehicular accidents. F. S. Section 627.7372 (West 1984). Additionally, in medical malpractice claims, after a finding of liability has been determined, the court is required to reduce the award by the amount paid to the client from all collateral sources not subject to subrogation. F. S. Section 768.50(1) (West Supp. 1984). Finally, the defendant contends that Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984), struck down the collateral-source rule in remaining tort

actions. Thus, the defendant should be permitted to introduce or elicit evidence of payments from collateral sources.

This Court disagrees with this position relative to workers' compensation benefits and any other benefits which the plaintiffs are obligated to repay.

Under Florida's Workers' Compensation Law, should the defendant be found liable for the plaintiff's injuries, he is then obligated to repay the workers' compensation carrier for benefits received and for future benefits. F. S. Section 440.39(3)(a) (West Supp. 1984). Thus, evidence regarding such benefits shall not be admissible.

Further, the Court notes that while Florida law permits collateral-source evidence in personal injury litigation arising from automobile accidents, that law specifically states that

"[n]otwithstanding any other provision of this section, benefits received under the Workers' Compensation Law shall not be considered a collateral source." F. S. 627.7372(3) (West 1984). Thus, under the statute, evidence of workers' compensation benefits is not admissible.

Finally, the defendant's reliance on the Florida Physician's Insurance Reciprocal decision for its position that the collateral-source rule is no longer viable is misplaced. The court held that in medical malpractice litigation, evidence of free or low cost services available to the public is admissible on the issue of future damages and did not violate the collateral-source rule. The court then limited the collateral-source rule to benefits "earned in some way by the plaintiff." Id at 515. Thus, the collateral-source rule is viable for

benefits earned by the claimant. Worker compensation benefits and benefits for which the claimant is obligated to repay are such "earned benefits" and are inadmissible on the issue of damages.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion in Limine be, and the same, is GRANTED. The defendant shall not introduce or elicit evidence of collateral source benefits received from a workers' compensation carrier or from any other source where the plaintiffs are obligated to repay benefits received or to repay future benefits.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Florida, this 29th day of January, 1985.

UNITED STATES DISTRICT JUDGE
JOSE A. GONZALEZ, JR.

cc: all counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Certiorari was mailed to Carolyn Pickard, Esq., Mershon, Sawyer, Johnston, Dunwody and Cole, Southeast Financial Plaza, 200 S. Biscayne Blvd., Miami, FL 33131 this 29th day of August, 1986.

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in the Supreme Court of the United States

October Term, 1985

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

TEXACO, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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20 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Eleventh Circuit Court of Appeals Erred in Affirming the Decision Below Per Curiam where the Court had Multiple Grounds upon which to Affirm Including Failure to Preserve Error on Appeal and where No Conflict Exists between the Eleventh Circuit's PCA and the Decisions Cited by the Frints.

II.

Whether the Trial Court Erred in Denying The Frints' Motion for a New Trial Where the Evidence Clearly Showed No Liability on the Part of Defendant Texaco, Inc. and Therefore any Mention of Social Security Disability Insurance Benefits was Harmless Error.

III.

Whether the Trial Court Erred in Denying the Frints' Motion for a New Trial Where The Frints Opened the Door to Evidence of Social Security Disability Benefits Through Their Own Expert's Testimony.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits several pertinent facts. Plaintiff, Randall Frint, was an employee of a Texaco, Inc. sub-lessee, ABC Service Station.[1] His duties included pumping gas for customers at the full service pumps and cleaning the grounds around the gas pumps. The accident complained of occurred at approximately 7:30 a.m. near the beginning of Mr. Frint's shift.

All fact witnesses, including Randall Frint, testified that it had been raining hard all night before the accident. Several witnesses testified that it was still raining shortly before the accident occurred. The only evidence of a water line mist was from Randall Frint himself, and he testified that while it had been leaking for several months, he told no one. Thus, the evidence was uncontroverted that neither the ABC Service Station nor Texaco, Inc. had knowledge of a water line leak.

The Frints alleged that ABC was Texaco's agent, but the evidence supported Texaco's position that under the terms of the sublease contracted between Texaco and ABC Service Station, Texaco, Inc. had no responsiblity to repair unless it was notified that repair was required and was requested to effectuate the repair. Texaco established a "hotline" for that purpose in Houston, Texas. Texaco received no call about the allegedly ruptured water line.

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[1]In compliance with Supreme Court Rule 28.1, Texaco, Inc. sets forth in an Appendix attached to this Brief, its affiliates and subsidiaries listed on its most recent Form 10K filed with the Securities and Exchange Commission.

The testimony was not in "irreconcilable conflict" as the Frints note in their Statement of the Case, p.9. The jury returned a no liability verdict within 40 minutes of retiring. The verdict form reflects that the jury never reached damages. To the first question: "Was there negligence on the part of Texaco, Inc. which was a legal cause of damage to Randall Frint, and Yhonis Frint", the jury answered "No." Then, following the verdict form's and the court's instruction, the jury properly proceeded no further and returned to the courtroom.

The Frints' economist expert, Mr. Schulenberger, testified that Randall Frint's future earning capacity included social security retirement benefits. Texaco's expert, Mr. Tomson, responded in kind, telling the jury if Randall Frint was disabled, he would be eligible for social security disability benefits. Frints' rebuttal witness, June Burke, testified that Mr. Frint should "retire with dignity" and that he would be eligible for social security, medicare and medical benefits. In closing argument, Texaco's counsel commented on the abovementioned evidence.

The Frints' counsel elicited Mr. Schulenberger's testimony regarding social security retirement benefits. Moreover, counsel did not object to June Burke's testimony or to defense counsel's closing remarks. His only objection occurred during Mr. Tomson's testimony early in the trial. However, that objection came *after* Mr. Tomson testified, and the plaintiffs' counsel failed to move to strike the evidence. Further, counsel's objections to Mr. Tomson's testimony on social security benefits was not specifically based on the collateral source doctrine, but on mischaracterization of the

amount of wages, on irrelevancy, on the fact that the evidence did not go to the issues in the case, and on the fact that the evidence went to loss of future earnings capacity.

SUMMARY OF ARGUMENT

The Frints fail to demonstrate any apparent or direct conflict between the Eleventh Circuit per curiam affirmance below and the three United States Supreme Court decisions they cite. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 268 (1963), *Eichel v. New York Central Railroad Co.*, 75 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) and *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) are legally and factually distinguishable from the case at bar.

The Frints' contention that the Eleventh Circuit misinterpreted Florida law is incorrect and even if true, would not suffice as a basis for certiorari. This Petition arises out of a simple negligence action with unique facts. This case is not of importance to other litigants. Certiorari review would not establish important precedent. The Eleventh Circuit reached a reasonable and permissible result.

REASONS FOR DENYING THE WRIT

This case is not appropriate for review. The Frints allege conflict but fail to demonstrate either the presence of any of the special or important reasons enumerated in Supreme Court Rule 17.1 or that the case below is within the character of Rule 17.

Petitioners assert conflict between this Eleventh Circuit Court of Appeals per curiam affirmance and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 268 (1963), and two other United States Supreme Court cases. Supreme Court Rule 17.1(c) provides that the conflict between a federal court of appeal and the Supreme Court be over a federal question. However, the case at bar devolves from a diversity action. The issues involve Florida substantive law and federal procedural law. No federal question was pled or tried.

The Frints observe that the lower appellate court did not write an opinion, but contend that the conflict "clearly appears when all potential alternative basis for decision are logically eliminated." (Petition for Writ of Certiorari, p.11). This conflict standard is offered without authority and, even if this "standard" were legally correct, the Petition fails to eliminate alternative bases. Indeed, the Frints defeat their own argument by reciting several possible reasons for the affirmance. Although the absence of an opinion does not foreclose certiorari in all situations, the lack of opinion herein takes on additional significance, because the Eleventh Circuit could have affirmed on several grounds.

The Frints' attempt to create a conflict where none is apparent flies in the face of this Court's traditional view that there must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. They make the conclusory statement that the PCA below conflicts with Supreme Court decisions, but fail to explain the conflict.

The cited Supreme Court cases do not conflict with the Eleventh Circuit's affirmance. They were not even controlling precedent in this diversity action. The cited opinions did not address the issues in the case at bar, i.e., Florida substantive law on collateral estoppel, federal procedural law on "opening the door" to evidence, or federal procedural law on failing to preserve error for appeal by proper and timely objection.

The *Tipton* decision involved federal law, not Florida law and addressed the issue whether evidence of compensation received under the Longshoremen's and Harbor Worker's Compensation Act affected the liability issue of the Plaintiff's status. *Eichel v. New York Central Railroad Co.*, 75 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) did not involve Florida substantive law. A general verdict was at issue in *Eichel*, not a special verdict where the court could point with certainty to the basis for the verdict, as in the case below. The Frints' final "conflicting" decision, *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) is even more distinguishable. *Kotteakos* was not a collateral source case. It addressed the federal harmless error statute in a criminal law context and is totally inapplicable to the case at bar.

The Frints' argument that the district court and the Eleventh Circuit misinterpreted Florida collateral estoppel law does not support the exercise of this Court's certiorari jurisdiction. This Court's reluctance to review diversity cases which set forth as the certiorari ground an alleged conflict with state law is reflected by the Supreme Court Rule 17.1 omission of the former Rule 19 item providing review of federal court of appeal

decisions that resolve "an important state or territorial question in a way in conflict with applicable state or territorial law."

In addition, the lower courts did not misinterpret Florida law.

First, as the evidence adduced below and the jury's answer to the jury verdict form demonstrate, the jury found no liability on Texaco's part. As the plaintiff testified, it had been raining all night. The jury properly could have determined that the plaintiff slipped on water from the rain. It insults the jury's intelligence to assert that it decided the case on damages where both counsel and the trial judge carefully explained to the jury that the special verdict form's first question involved liability only. Even if both lower federal courts mistrusted the jury and believed that the verdict was somehow based on the damages issues, the Florida collateral source cases are distinguishable and could not control the outcome of this case. Unlike the case at bar, the Frints' Florida cases involved general verdicts where the reviewing court could not determine whether liability or damages was the basis for the verdict.

Second, the Frints' counsel "opened the door" to evidence of social security benefits through direct examination of their own witness Schulenberger. One of the Eleventh Circuit panel judges observed that he saw no difference between social security retirement benefits and social security disability benefits. Also, as the Frints correctly state, at oral argument two of the Eleventh Circuit court judges seemed to accept Texaco's argument that the Frints opened the door to admissions of social security disability evidence. The panel directed

most of its questions to that issue. The court appeared to affirm on that basis, surely not a ground for conflict jurisdiction. Texaco certainly had a right to refute the testimony of plaintiffs' expert.

The Frints "immaterial" argument is also unavailing. (Petition, p.19). The Frints made the evidence of social security benefits material by introducing it not once, but twice through Schulenberger and June Burke. The Frints' contention that if the Eleventh Circuit affirmed on this basis, certiorari should be granted because the court thereby incorrectly applied the law on "curative admissibility", is unpersuasive. (Petition, p. 17-19). Curative admissibility is only one principle governing the admission of evidence. "Opening the door" to admissibility is another. The testimony of Mr. Schulenberger and Mrs. Burke left the door wide open.

Finally, the Frints' counsel failed to preserve the issue of social security benefits evidence by proper objection. It is axiomatic under either Florida or federal law that timely objection must be made to preserve evidentiary rulings for appeal. The Eleventh Circuit could have affirmed on that basis alone. Again, this is no ground for certiorari review.

Of equal significance, this case does not merit the highest review, because it is not sufficiently important to other litigants. The decision below is confined to its own peculiar facts and does not possess the requisite universality for certiorari review by the United States Supreme Court. This Court consistently has denied such Petitions arising out of diversity cases in negligence, property and contracts.

Nor would certiorari review establish important precedent or correct an erroneous decision. The unique facts (including the special verdict form and overwhelming factual testimony that Mr. Frint hurt himself slipping in rain water) guarantee no future precedential value.

The decisions below were not erroneous. The jury returned a correct and reasonable verdict on the facts. The judge interpreted Florida law and correctly instructed the jury. The district court correctly denied the new trial and the Eleventh Circuit properly affirmed. No error occurred. Simply stated, the Frints strain for a third "bite of the apple."

As highlighted by its speculative tone, the Petition establishes no direct conflict. The Frints allege: "Probably the appellate court did not decide that Petitioners opened the door." (Petition, p.13). "It is very possible that our jury was. . . ." (Petition, p.16). "If this was the basis for the decision, the writ of certiorari should be granted." (Petition, p.17). Finally: "If the Circuit Court decided Petitioners opened the door. . ." (Petition, p.20). Such speculation does not support certiorari review.

CONCLUSION

The Eleventh Circuit Court of Appeals reached a reasonable and permissible result. Based on the foregoing legal arguments and authorities, Respondent, Texaco, Inc. respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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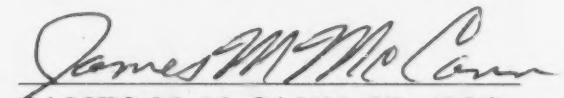
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of this Brief in Opposition to Petition for Certiorari were mailed to Paul Richard Bloomquist, Esq., 7601 North Federal Highway, Building A., Suite 265-A, Boca Raton, Florida 33431 this 10th day of October, 1986, by depositing the Briefs in a United States mailbox, with first-class postage prepaid pursuant to Supreme Court Rule 28(3).



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Appendix

INDEX TO APPENDIX

List of Texaco, Inc.'s
Affiliates and Subsidiaries A-1

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO, INC.

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A. Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company

Canadian Reserve Oil and Gas Ltd.
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985 (3)

No. 86-410

RANDALL FRINT and YHONIS FRINT,

Petitioners,

-against-

TEXACO, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Frankly, a number of statements in Defendant's brief in opposition are just plain misleading. The evidence was indeed in irreconcilable conflict. The credibility of Defendant's liability witnesses was highly suspect.

The "rain defense" is a perfect example of the evidentiary clash. RANDALL FRINT did not testify that "it had been raining hard all night before the accident," as he is misquoted in the brief in opposition at pages one and six. On the contrary, RANDALL FRINT swore it stopped raining several hours before the accident. His testimony was corroborated by that of Professor Herbert Spiegel, a meteorologist, who examined radar pictures, weather satellite photos and official hourly precipitation reports. Mr. FRINT'S and Professor Spiegel's

testimony contradicted and impeached the testimony of all of Defendant's liability witnesses, all of whom testified falsely that it was raining shortly before the accident. Several of Defendant's liability witnesses untruthfully said it was raining at the time of the accident.

The evidence was also in conflict as to whether Defendant was on notice of the hazard. Defendant and all of its aforementioned witnesses denied any knowledge thereof. However there was evidence that the leak was open and obvious for months before the accident. Thus Defendant had constructive notice of the dangerous condition.

Defendant denied it had any duty to maintain the water line. But Defendant procured the water line and undertook to maintain it. And Defendant promised its landlord that it would "...keep the [the

leaking element in the water line] in good...condition...and make all...repairs..." Also, in the sub-lease Defendant reserved the right to control the maintenance of the leaking element.

The District Court submitted the case to the jury because the evidence was in conflict. Defendant had so much confidence that the truth would set it free that at the very end of its case it presented Tompson's blurted inadmissible, prejudicial testimony in blatant violation of Florida's collateral source rule and eliminated its alleged easy out.

Petitioners filed a motion in limine intended to keep evidence relative to collateral benefits from the jury and objected to the first improper question asked of Tompson. One of the bases for the objection was immateriality, the technical basis underlying the collateral

source rule. The record will reflect that defense counsel interrupted the objection and handed the District Court a copy of Florida Physicians Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1985). The Court scanned the case, apparently concluded that the evidence was admissible, and overruled the objection.

Petitioners did not elicit June Burke's testimony relative to social security disability insurance benefits, contrary to the representation on page seven of the brief in opposition. Defendant adduced the testimony during its cross-examination.

REASONS FOR GRANTING THE WRIT

Defendant admitted the District Court erroneously admitted the evidence of collateral benefits.

Defendant does not deny unfairly

exploiting the evidence in its summation.

There are three reasons why this Court should grant the petition. First, the Court of Appeals decided the federal question relative to application of 28 U.S.C. Section 2111 and Rule 61, Federal Rules of Civil Procedure to this case in a way in conflict with Kotteakos, Tipton and Eichel. Supreme Court Rule 17.1 (c). The conflict is explained in the petition at pages thirteen through sixteen. No differences in facts or substantive laws governing liability remove this case from the control of those authorities.

Petitioners never contended the Court of Appeals misinterpreted Florida substantive law. During the oral argument Defendant admitted the District Court incorrectly applied Florida's collateral source rule. Surely the Court of Appeals did not make the same mistake.

It must have decided the error was harmless, in conflict with Tipton.

Defendant emphasizes one side of the evidence and urges this Court to forsake the Kotteakos rule and let the appellate Court's error go uncorrected.

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 66 S.Ct. at 1247-1248.

There is grave doubt as to whether erroneous admission of testimony as to collateral benefits amounting to about a quarter of a million dollars had "substantial influence" upon the jury. Defendant tried as hard as it could to maximize the improper influence through argument regarding double payment.

Second, the Court of Appeals decided an important question of federal law

which has not been, but should be, settled by this Court, the question being relative to application of the collateral source rule in combination with doctrine of curative admissibility. Supreme Court Rule 17.1 (a).

Arguably the second question is more important than the questions this Court decided in Tipton and Eichel, because erroneous application of the doctrine of curative admissibility could nullify, not only those decisions, but also the collateral source rule itself, to the great prejudice of untold numbers of litigants. A corrective precedent would be most important.

The appellate Court either decided the case in a way in conflict with Tipton and Eichel or it ignored the cases. Either way petition should be granted.

Third, the Court of Appeals so far

sanctioned a departure from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1 (a).

Petitioners preserved these issues for review by filing their motion in limine and objecting to the first improper question asked of Tompson. Tompson's really prejudicial testimony was unresponsive to the question preceeding it. At the appropriate time Petitioners objected that the evidence was immaterial. Defense counsel interrupted the objection and handed the Court a copy of the Florida Physicians Insurance Reciprocal decision. The Court was apprised of Florida's collateral source rule. Unfortunately the court misinterpreted the decision and overruled the objection. At that point a motion to

strike Tompson's blurted testimony would have been a futile and unnecessary gesture.

Subsequently defense counsel elicited June Burke's testimony relative to Social Security disability insurance benefits.

Defendant's summation was not objectionable because it was based upon the evidence erroneously admitted even though it insured and aggravated the prejudice resulting from the error.

I HEREBY CERTIFY that three true copies of the foregoing were mailed to James M. McCann, Jr., Esq., 200 S. Biscayne Blvd, Ste. 4500, Miami, FL 33131 this 17th day of October, 1986 pursuant to Supreme Court Rule 28(3).

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